82-1753

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HUSTLER MAGAZINE, INC.,
a corporation, and
CHIC MAGAZINE, INC.,
a corporation,

Petitioners,

vs.

EASTMAN KODAK COMPANY,
a corporation,

Respondent.

WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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1. QUESTIONS PRESENTED FOR REVIEW.

1.1. Does censorship of speech in the form of pictures "based upon fear of criminal prosecution" under state and federal statutes by one who has received state and federal trademark and patent grants constitute state action? Included within this broader issue are the following latent questions:

1.1.1. Does the standard for measurement of significant governmental involvement to constitute state action vary with the wrong charged such that the "state compulsion test" repeatedly applied by this Court in race discrimination cases can properly be ignored where race discrimination is not involved (which position some lower courts have adopted based upon Justice Brennan's concurring and dissenting opinion in Adickes v. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970)) or does this Court's decision in Lugar v. Edmondson Oil Co.,

Inc., ___ U.S. ___, 102 S.Ct. 2744 (June 25,1982) command consistent application of the state compulsion text?

1.1.2. Is application of the "public function test" as an alternative basis for finding state action inapplicable by reason of Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729 (1979) in all private commercial transactions (as successfully urged by Respondent in the lower courts, but contrary to a long line of other cases) or does Flagg prohibit such application to the more limited aspect of private commercial transactions involved in the "settlement of disputes between debtors and creditors"?

1.1.3. In determining the presence of state action under the "nexus test", is the grant of state and federal trademark and patent monopolies to be treated as the leasing of public property (held sufficient under Burton v. Wilmington Parking Authority,

365 U.S. 715, 81 S.Ct. 856 (1961)) or as the ministerial acts of granting corporate charters, licenses and permits (which have been found to be insufficient)?

1.2. Is a magazine publisher-owner of pictures entitled to a determination of the constitutionality of the application of state and federal statutes which require confiscation of pictures by a film processor, without due process or compensation, where the pictures have not yet been subjected to editorial process from which it is determined if the picture should be published, if so what portion, if so in what context within the individual article, and if so the overall content of the magazine?

1.3. May obscenity statutes be applied to require censorship by private parties of materials in the prepublication stage without the procedural due process protections heretofore prescribed by this Court?

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Petitioners[1/] respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") to review the final order of that court entered on September 16, 1982 in case numbers 80-6077 and 80-5861 which affirmed the judgment entered in the United States District Court for the Central District of California ("District Court") on November 14, 1980 in case number CV 80-561 IH based upon an order entered September 29, 1980 granting Respondent's motion for summary judgment.

2. OPINIONS BELOW. The opinions below are unreported. Copies of

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1/ The caption lists all parties (Rule 21.1(c)). L.F.P., Inc. is Petitioners' parent company, and there are no affiliates or subsidiaries other than wholly owned subsidiaries of one of the Petitioners except LFZ, Ltd., a subsidiary of Hustler Magazine, Inc. Petitioners are unaware of Respondent's parent, subsidiary or affiliated companies.

opinions are included in Appendix A.[2/]

3. JURISDICTION THIS COURT. The judgment sought to be reviewed is the Order of the Ninth Circuit filed September 16, 1982 affirming November 14, 1980 District Court, Judgment for Respondent based on September 29, 1980 District Court Order granting Respondent's motion for summary judgment. On November 15, 1982, the Ninth Circuit denied Petitioner's Petition For Rehearing and the Request for Rehearing en banc filed September 30, 1982. On January 24, 1983, this Court extended the time for this Petition to March 19, 1983. This Court has jurisdiction of a petition for writ of certiorari under 28 U.S.C. §1254.

2/ With this Petition are two appendices each being filed under separate cover pursuant to Rule 21(k). All references herein (1) to "App." are to Appendix A (and the page numbers thereof are preceded by the letter "A"), or (2) to "Ex." are to Appendix B (Excerpts filed in Court of Appeals).

4. CONSTITUTION AND STATUTES. This case involves the following constitutional provisions and statutes, the pertinent text of which is set forth in App. A-54-58: First Amendment to United States Constitution, Fourteenth Amendment to United States Constitution ("Amendment(s)"), 18 U.S.C. §§1461, 1462 and 1465 ("§§1461-5"), 28 U.S.C. §2201, 42 U.S.C. §1983 ("§1983") and California Penal Code §311.2 ("§311.2").

5. STATEMENT OF CASE. Petitioners (Plaintiffs and Appellants below) gave film to Respondent (Defendant and Appellee below and sometimes called "Kodak") for developing. Respondent confiscated the developed pictures[3/]

3/ In this case the pictures are in the form of transparencies. Pictures are within the ambit of protection of the First Amendment of the United States Constitution ("First Amendment"). N. 7 in Erznoznik v. City of Jacksonville, 422 U.S. 205,211, 95 S.Ct. 2268,2273 (1975). "[P]lays, motion pictures and photographs are protected forms of expression, (cont'd)

(App. [see N.2, supra] 14:25) pursuant to its policy adopted because of its fear of prosecution under, and therefore under color of, both federal and State laws. (Trial Court's findings at App. 38:24, 40:12 and 40:23 and Respondent's concession at Ex. [see N.2, supra] 103-107, [quoted in part at N.5 App. A-62] and App. A-111 and A-123 [quoted in §8.2 infra].) Petitioners are unable to obtain quality processing from other sources. (Ex. 279:14, 296:5, 301:19, 306:16, 310:22.)

Respondent's developing film for a publisher is merely an early intermediate

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3/ (cont'd) Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495,502, 72 S.Ct. 777 (1952)." Magazines are likewise protected, and are presumptively protected material under the First Amendment. Penthouse Intern., Ltd., v. McAuliffe, 610 F.2d 1353,1359 (5th Cir. 1980). "It is of no significance that expression which is protected by the First Amendment takes place in a commercial setting. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S.Ct. 631 (1963)."

step in Petitioners' publication process (Ex. 274:15-278:21) and Respondent is aware of that fact (Ex. 124:21). Although Respondent has the pictures[4/] (and Petitioners have not seen them), Respondent's motion for summary judgment neither attaches nor describes the withheld pictures.[5/]

Petitioners' evidence (Ex. 276-278) shows that none of the following is

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4/ Petitioners submitted clear evidence that while the pictures held by Respondent may be under others' names, Respondent is withholding films belonging to Petitioners. (Ex. 289 to 293, 310:8, 312 and 313.) The District Court found that Respondent has retained and refused to deliver the pictures (Ex. 365:25), and Respondent at oral argument (Ex. 366:9) and in its brief to the North Circuit (App. A-110) accepted this finding.

5/ Petitioners do not believe that the contents of such transparencies is relevant in this litigation much less in the summary judgment motion. Obviously no one can say what the film never even presented to Respondent (because of Respondent's confiscation practice) would have shown.

known: (1) how the confiscated transparencies would have been altered before publication, (2) which of the transparencies would have been used at all, (3) what the size of the pictures in the magazine would be, (4) the content of the text of article in which the pictures would appear, or (5) the overall content of the magazine.6/

6/ Respondent by footnote to its trial court brief (Ex. 73) without any supporting foundation in any sworn statement refers to an attachment which purportedly contains copies of other publications by the Petitioners which obviously do not include the transparencies which Respondent has withheld. Assuming the attachments to Respondent's counsel's brief had been proved to be Petitioners' product, they still would not be evidence. First, they do not demonstrate whether these (or any other) particular pictures in Respondent's hands would ever be used for the above reasons. Secondly, in United States v. Tupler, 564 F.2d 1294,1297-1298 (9th Cir. 1977), the Court stated that evidence "that both the sender and the recipient of the shipment were known dealers in sexually explicit materials; that one of the suspects in the case had previously been convicted of an obscenity offense and was currently under indictment for another; and that the clerk in the consignee bookstore (cont'd)

Petitioners filed their Complaint in four counts, the first of which is for anti-trust violations. The second[7] and

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6/ (cont'd) described similarly labeled films as 'hard core' do not constitute evidence of the motion picture film under consideration." Nor may reference be made to prior publications of Petitioners. A restraint which "operates to suppress, on the basis of previous publications" is unconstitutional. Organization For A Better Austin v. Keefe, 402 U.S. 415,418, 91 S.Ct. 1575,1577 (1971).

7/ The second count of the instant Complaint is brought under §1983 which requires that the challenged conduct be done "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory." "The under color of law requirement of §1983 has been treated as the equivalent of the state action requirement of the Fourteenth Amendment." Adams v. Southern Calif. First Nat. Bank, 492 F.2d 324,329 (9th Cir. 1973). "In United States v. Price, 383 U.S. 787, 794, n. 7, 86 S.Ct. 1152, 1157 n. 7, (1966), we explicitly stated that the requirements were identical: 'In cases under §1983, "under color" of law has consistently been treated as the same thing as the "state action" required under the Fourteenth Amendment.'" Lugar v. Edmondson Oil Co., Inc., ___ U.S. ___, 102 S.Ct. 2744, 2749 (June 25, 1982). For purposes of determining whether a private party is subject to prohibitions of the Amendments to the Constitution, "state action" includes both federal action and action by one of the several states (Simkins v. Moses (cont'd)

third counts seek damages and injunctive relief under §1983 and the First and Fourteenth Amendments, respectively, by reason of Respondent's interference under color of law with Petitioners' exercise of their rights of free speech. Count 4 further seek a declaration that §§311.2 and 1461-5 cannot be applied so as to subject a film processor to criminal prosecution for returning pictures to the owner for possible subsequent use in a magazine, and thereby indirectly censor

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7/ (cont'd) H. Cone Memorial Hospital, 323 F.2d 959,967 (4th Cir. 1963)), but might technically better be described generically as "governmental action" (N.5, Jackson v. Statler Foundation, 496 F.2d 623,627 (2nd Cir. 1974)). Respondent concedes that in light of the third count, seeking recovery based upon the First and Fourteenth Amendments, the determination of governmental action (state action) must consider not only the involvement of the State of California, but also the United States. (Ex. 84:17.) While "governmental" would be better descriptive, since the words "state action" have been repeatedly used to include both federal and State actions, we shall refer to "governmental action" or "state action" interchangeably to include both federal and State action.

the publisher through prior restraint.

Respondent filed its answer and a motion for summary judgment. On September 22, 1980, the District Court announced its decision to grant the motion as to the second, third and fourth counts and to grant the motion (to dismiss) the first count, with leave to amend within ten days.8/

An action for mere possession would be fruitless in that by the time transparencies are returned they would be of little, if any, value. (Ex. 273:7-284:4.) Petitioners are in a position where they have no relief available for Respondent's wrongful censorship and confiscation unless they can receive relief under §1983 or the First or Fourteenth Amendments or can obtain a declaration that application of the statutes to require such censorship

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8/ No amendment was filed and Petitioners seek no review of the portion of Judgment based on dismissal of Count 1.

and confiscation is unconstitutional.

6. JURISDICTION -- LOWER COURTS.

The district court had subject matter jurisdiction of Count 2 thereof under 28 U.S.C. §1343(3), and of Counts 3 and 4 under 28 U.S.C. §1331. The Ninth Circuit had jurisdiction under 28 U.S.C. §1291.

7. REASONS FOR GRANTING WRIT.

7.1. The Ninth Circuit's decision that censorship based upon fear of criminal prosecution under state and federal statutes does not constitute state action is in direct conflict with the decision of the Fourth Circuit. (§8.3.1.2., below.)

7.2. The Ninth Circuit by affirming the District Court's decision "for the reasons announced by the district court" (App. A-1) ruled that decisions in race discrimination

cases[9] applying the "state compulsion test"[10] were inapplicable to other cases, thereby establishing a hierarchy of constitutional rights. Either that decision is in conflict with the applicable decisions of this Court or if the decisions of this Court have not settled the matter, then it is an important question of federal law which should be settled by this Court.

7.3. The important question of federal law as to whether the "public function test" is to be inapplicable in all private commercial transactions or only in those involving the "settlement of disputes between debtors and creditors" has not been, but should

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9/ Adickes v. Kress & Co., 398 U.S. 144, 80 S.Ct. 1598 (1970), Robinson v. State of Florida, 378 U.S. 153, 84 S.Ct. 1693 (1964); and Peterson v. City of Greenville, S.C., 373 U.S. 245, 83 S.Ct. 119 (1963).

10/ So denominated in Lugar, supra, ___ U.S. at ___, 102 S.Ct. at 2755 (June 25, 1982) citing Adickes, supra.

be settled by this Court.

7.4. Whether the grant of trademark and patent monopolies which serve to enable a defendant's wrong are sufficient to constitute state action is an important question which has neither been decided by this Court nor by any court in a published decision (App. A-122), and should be settled by this Court.

7.5. The rulings of the lower courts here approve the application of obscenity statutes to require censorship by private parties of materials in a pre-editorial stage without consideration of (1) how the materials will ultimately appear in published version, (2) the entire article of which the materials would become a part, or (3) the entire magazine issue of which the article would become a part, and in so doing either conflict with the applicable decisions of this Court, or decide an important question of federal law which

has not been, but should be, settled by this Court.

7.6. The rulings of the lower courts in this case approve the application of obscenity statutes to require censorship by private parties of materials in the pre-publication stage without procedural due process protections, and as such either are in conflict with the applicable decisions of this Court or decide an important question of federal law which has not been, but should be, settled by this Court.

8. ARGUMENT.

8.1. Standard Of Review. The standard of review of the granting of summary judgment is set out in Heiniger v. City of Phoenix, 625 F.2d 842,843 (9th Cir. 1980) as follows:

"STANDARD OF REVIEW

"A reviewing court will affirm a grant of summary judgment only if it appears from the record, after viewing all evidence and factual interferences in the light most

> favorable to the appellant, that there are no genuine issues of material fact and that the appellee is entitled to prevail as a matter of law."

In an action under §1983, a defendant moving for summary judgment has the burden of foreclosing all possibility that the plaintiff could prevail, and it is the burden of the moving party to "establish the absence of a genuine issue" and not upon the opposing party to raise same and "even if no opposing evidentiary matter is presented." Adickes, supra, 398 U.S. at 157,159,160, 90 S.Ct. at 1608,1609.

The foregoing standard of review is consistent with the elementary rules applicable to motion for summary judgments which the lower courts did not follow: the burden is upon the moving party to show absence of genuine issue, the inferences must be drawn in favor of opposing party, the evidence and legal theories must be viewed most favorably to opposing party and the court may not weigh conflicting

affidavits or inferences.11/

8.2. Application of Statutes Compelling Respondent's Confiscation Violates Petitioner's Freedom of Speech. Respondent has conceded that

> "Kodak adopted its policy [of confiscation] only to protect its own interest, solely because Kodak fears that returning the sexually explicit pictures it withholds might subject Kodak and/or its employees to the risk of being criminally prosecuted for violating constitutionally valid state and federal obscenity statutes." App. A-123.
>
> "Kodak withholds... films and pictures... to protect Kodak and its employees from criminal charges and prosecution based on the very act of mailing or otherwise delivering the film and pictures to Kodak's customers.5/" App. A-111. (Respondent's N.5 identifies the statutes as §§1461-5 and §311.2.)

The District Court stated that the state and federal statutes of which "Kodak

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11/ "As the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." Adickes, supra, 398 U.S. at 157, 90 S.Ct. at 1608.

is concerned... track the decisions of the Supreme Court [and] are presumptively and probably valid." (App. A-40:12.) While the statutes may "track" and be "presumptively valid," this the application does not track and is not presumptively or otherwise valid. No case has yet suggested that the state (may absent a clear and present danger) interfere with free speech before publication, or ever, absent procedural due process which Petitioners have not received, and the authorities are clear that the state may not compel another to do what it could not do directly itself. Baldwin v. Morgan, 287 F.2d 750,756, (5th Cir. 1961) relied upon in Adickes, supra, 398 U.S. at 170-171, 90 S.Ct. at 1615. Respondent's assertedly compelled application of the statutes fails to "track", or comply with, the authorities in five separate respects: (1) prior restraint at a pre-publication editorial stage is unconstitutional, (2) pictures in pre-

publication form are not legally capable of being tested for obscenity, (3) Petitioners' magazine must be judged as a whole and not merely pictures therefrom, (4) the Respondent tests applied do not comport with the constitutional requirements and (5) Petitioners' have not been afforded the procedural due process required for censorship.

8.2.1. Censorship Limitations - Prior Restraint.

> "We must start from the recognition that the films were presumptively protected by the First Amendment. Roaden v. Kentucky, 413 U.S. 496, 93 S.Ct. 2796 (1973). Since seizure of First Amendment-protected materials constitutes a form of prior restraint, the materials are entitled to special treatment..." United States v. Tupler, 564 F.2d 1294,1297 (9th Cir. 1977).

Respondent's policy of confiscation directly affects and threatens Petitioners' freedom of speech and press by precluding its expression. This constitutes a prior restraint of speech, for which the Supreme Court has acknowledged a deep distaste and

which "comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58,70, 83 S.Ct. 631,639 (1963)16/.

Application of the statutes to compel Respondent's confiscation subjects Petitioners' freedom of speech to "appraisal of facts, the exercise of judgment, and the formation of an opinion," factors which characterize censorship.17/

16/ Later quoted in New York Times Company v. U.S., 403 U.S. 713,714, 91 S.Ct. 2140,2141 (1971). See also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546,553-554 95 S.Ct. 1239,1244 (1975) and Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940).

17/ See Southeastern, N. 16 supra, 420 U.S. at 558-9, 95 S.Ct. at 1246-7, in which the Court additionally stated: "It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." Here the evidence shows that not only is it "difficult to know in advance what" Petitioners magazines will say or depict, it's impossible.

In Near v. State of Minnesota, 283 U.S. 697,721, 51 S.Ct. 625,633 (1931) the Supreme Court struck down a statute "authorizing suppression" of materials. Here application of the statutes according to Respondent requires it to suppress the transparencies. The Court there stated that it was irrelevant whether the restraint was directly by the legislature or only indirectly. In Near the asserted justification for the prior restraint was the injury suffered from libelous publications. In this case the alleged injury is the publication of obscenity. Substituting obscenity for libel, the rule to be drawn from Near is (bracketed portions representing such substitutions):

> "The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of [obscene matter] necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this

court has said, on proof of [nonobscenity]. [citation.]

"Equally unavailing is the insistence that the statute is designed to prevent the circulation of [obscenity] which [is undesireable]. [T]he theory of the constitutional guarantee is that even a more serious public evil would be caused by authority to prevent publication."

The rule of Near applies in the case of disputes between private parties as it does in disputes between the government and a private party[18/], and freedom of speech and press applies to commercial as well as non-commercial speech.[19/]

In Southeastern, N. 16 supra, this Court (420 U.S. at 552, 95 S.Ct. at 1243) declared the defendant's conduct was

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18/ Organization For A Better Austin v. Keefe, 402 U.S. 415,418, 91 S.Ct. 1575, 1577 (1971) and Goldblum v. National Broadcasting Corp., 584 F.2nd 904,907 (9th Cir. 1979).

19/ New York Times Company v. Sullivan, 376 U.S. 254,256, 84 S.Ct. 710,713 (1964) and Quinn v. Aetna Life & Cas. Co., 616 F.2d 38 (2nd Cir. 1980).

unconstitutional regardless of whether the play was obscene. Once a prior restraint was found, the nature of the speech became insignificant.

8.2.2. Pre-Publication Material Cannot Be Censored. Petitioners and Respondent agree that the film sent to Respondent by or for Petitioners is merely an early intermediate step in the process of Petitioners' publishing their magazines. (§5 above.) Respondent's threatened and actual confiscation of film directly intereferes with the Petitioners' editorial process and freedom of press by denying Petitioners films which they might use, and therefore, requires their use of other transparencies of inferior quality. Application of the statutes as asserted by Respondent requires it to enter the composing room of Petitioners to give directives as to the content of expression by Petitioners and to censor Petitioners' speech. The law with respect

to such activity is well- stated in Goldblum, N. 18, supra, 584 F.2d at 907:

> "It is a fundamental principle of the first amendment that the press may not be required to justify or defend what it prints or says until after the expression has taken place. The Government has been prohibited from interfering with the editorial process by entering the composing room to give directives as to the content of expression. The district court proceedings here intervened in the editorial process by ordering an official of the broadcasting company to produce a film just before its scheduled broadcast so that it could be examined for inaccuracies. A procedure thus aimed toward prepublication censorship is an inherent threat to expression, one that chills speech." (Emphasis added and citations omitted.)

Similarly in Pittsburgh Press Co. v. Pittsburgh Com'n on Human Rel., 413 U.S. 376,390, 93 S.Ct. 2553,2561 (1973) this Court stated:

> "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."

Because of the assertedly compelled application of the statutes, Respondent

exercises "excessive caution" resulting in Petitioners loss of their freedom of speech. In Baggett v. Bullitt, 377 U.S. 360,372,84 S.Ct. 1316,1323 (1964) this Court struck down a statute creating a prior restraint because it forced "[t]hose... sensitive to the perils posed by [the statute to] avoid the risk... by restricting their conduct to that which is unquestionable safe. Free speech may not be so inhibited."

In reversing a §311.2 conviction the court in In Re Klor, 64 Cal.2d 816,820,821 (1966) stated:

> "Without the requirement that the defendant be shown to have prepared the material with intent to distribute it in its obscene form, the statute would apply to matter produced solely for the personal enjoyment of the creator or as a means for the improvement of his artistic technique. Such a statute would approach an interdiction of individual expression in violation of the First and Fourteenth Amendments. (See Griswold v. Connecticut (1965) 381 U.S. 479, 482 [85 S.Ct. 1678]; American Communications Assn. v. Douds (1950) 339 U.S. 382,412 [70 S.Ct. 674].)

* * *

"Nor does such conduct occur if the creator intends to purge the material of any objectionable element before distributing or exhibiting it. To hold otherwise would pose grave technical difficulties for the unconventional artist and would, because of the risk of criminal sanctions, tend to suppress experimental and tentative productions that might become, in finished form, constitutionally protected communication. '... [T]he Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.' (Bantam Books, Inc. v. Sullivan (1963) 372 U.S. 58,66 [83 S.Ct. 631].)"

8.2.3. Available Alternative Means of Publication Will Not Save A Prior Restraint. The evidence shows a conflict as to whether alternatives are available to Petitioners. However, even were alternatives proved as a matter of law, it would not establish the absence of genuine issue of state action.

"Whether petitioner might have used some other, privately owned, theater in the city for the production is of

no consequence. There is reason to doubt on this record whether any other facility would have served as well as these, since none apparently had the seating capacity, acoustical features, stage equipment, and electrical service that the show required. Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' Schneider v. State 308 U.S., at 163, 60 S.Ct., at 151." Southeastern, supra, 420 U.S. at 556, 95 S.Ct. at 1245.

8.2.4. Must Consider Finished Whole Magazine. Here Respondent at best is judging pictures which may or may not be included in a magazine and is not considering the entire magazine, because of course it can't. Such application of a statute is unconstitutional.

"[A]ppellant would view each separate article and pictorial presentation, to determine whether each 'work' in a 'volume' is obscene under the Miller test. We conclude that decisions of both the Supreme Court and this court require us to treat each magazine as a separate work that is to be taken as a whole." Penthouse Intern., Ltd. v. McAuliffe, 610 F.2d 1353,1366-1367 (5th Cir. 1980).

If it is improper to view only entire articles, how much more so to view merely pictures from such articles.

In United States v. Tupler, N. 6, supra, the court stated:

> "First Amendment standards require that any determination of obscenity be made considering the material as a whole...
>
> "A single photographic print or 'out take' from a roll of motion picture film... could never establish probable cause to believe that the film 'taken as a whole, lacks serious literary, artistic, political, or scientific value.'" 564 F.2d at 1297. (Emphasis added.)

If a single "out take" cannot establish the obscenity of a motion picture, then surely a single picture which may never be used in a magazine cannot establish that the magazine "taken as a whole, lacks serious literary, artistic, political, or scientific value."

These cases follow the statements of Judge Hand in U.S. v. One Book Entitled Ulysses, 72 F.2d 705,707 (2nd Cir. 1934) holding that the publication must be "taken

as a whole".

8.2.5. Respondent's Policy Does Not "Track". The standard for obscenity established in Miller v. California, 413 U.S. 15,25, 93 S.Ct. 2607,2615 (1973) is a three-pronged test including:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 25, 93 S.Ct. at 2615. (Emphasis added, citations omitted.)

As discussed under §§8.2.2. and 8.2.4. above, the transparencies are (if used at all) substantially altered prior to appearance in Petitioners' magazines. Textual material is also added. Respondent's assertedly compelled application of the statutes (Ex. 106-7) does not purport to consider the whole magazine, and thereby

fails to comply with prongs (a) and (c) of this conjunctive test. Nor does Respondent's policy require depiction in a "patently offensive way" so as to meet the second prong.

8.2.6. Procedural Due Process.

This Court has imposed a substantial set of due process requirements upon censors.20/ Respondent has complied with none of them and Petitioners have been afforded none of the foregoing rights.

20/ See Freedman v. Maryland, 380 U.S. 51, 58-59, 85 S.Ct. 734,739 (1965); United States v. Thirty Seven (37) Photographs, 402 U.S. 363, 91 S.Ct. 1400 (1971); Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423 (1971); Southeastern Promotions, supra, Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676,684-689, 88 S.Ct. 1298, 1303-1306 (1968). The basic due process requirements can be summarized as follows: (1) the standard for determining whether a work is obscene must comply with constitutional standards of obscenity and may not be vague, overly broad or imprecise; (2) the burden of proving that the work is unprotected expression must rest on the censor; (3) the censor, within a specified brief period, must either issue a license or go to court to restrain the use of the allegedly obscene material; (4) any restraint imposed in ad- (cont'd)

"There must be some judicial determination of obscenity before a seizure or 'constructive seizure' may occur." Penthouse, supra, 610 F.2d at 1359.

8.3. State Action Exists On Any One of Three Basis. Respondent did not prove as a matter of law the absence of state action. Rather Petitioners demonstrated sufficient evidence to permit trial of the issue of state action on three separate basis: the "state compulsion test," the "public function test" and the "nexus test." (Lugar, supra, ___ U.S. at __, 102 S.Ct. at 2744,2755.)

8.3.1. State Action Arises From Compulsion of Statutes. We agree with Respondent that a showing of "significant governmental action and

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20/ (cont'd) vance of a final judicial determination on the merits must similarly be limited to the preservation of the status quo for the shortest fixed period compatible with sound judicial resolution; (5) the censorship procedure must also assure a prompt final judicial decision to minimize the deterent effect of an interim and possibly an erroneous denial of a license. Freedman, and Interstate Circuit, supra.

involvement" is required. (Ex. 82:9.) The evidence, however, demonstrates that not only was the government involved, it was the catalyst for Respondent's actions by compelling the same. (§5 above.) State action exists when a party is acting under compulsion of law. In Flagg Bros., Inc. v. Brooks, 436 U.S. 149,164, 98 S.Ct. 1729,1737 (1978) this Court stated:

> "Our cases state 'that a state is responsible for the... act of a private party when the state, by its law, has compelled the act.' Adickes, 398 U.S. at 170, 90 S.Ct. at 1615."

This rule has been recognized by this Court in Lugar, supra, and adopted in Adickes, Robinson and Peterson, N.9, supra, and in Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638 (4th Cir. 1975).

In Adickes, the plaintiff sued to recover damages under §1983 and this Court in reversing summary judgment for the defendant, stated (upper case being Court's emphasis):

"Although this Court has not explicitly decided the Fourteenth Amendment state action issue,... underlying the Court's decisions in the sit-in cases is the notion that the State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act. As the Court said in Peterson v. City of Greenville, 373 U.S. 244 (1963): 'When the state has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it'. Moreover, there is much support in lower court opinions for the conclusion that discriminatory acts by private parties done under the compulsion of state law offend the Fourteenth Amendment. In Baldwin v. Morgan, supra, the Fifth Circuit held that '[t]he very act of posting and maintaining separate [waiting room] facilities when done by the [railroad] Terminal as commanded by these state orders is action by the state.' The Court then went on to say: 'As we have pointed out above the State may not use race or color as the basis for distinction. IT MAY NOT DO SO BY DIRECT ACTION OR THROUGH THE MEDIUM OF OTHERS WHO ARE UNDER STATE COMPULSION TO DO SO.'...

"For state action purposes it makes no difference of course, whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law -- in either case it is the State that has

commanded the result by its law." 398 U.S. at 170-171, 90 S.Ct. at 1615. (Emphasis added.)

Respondent here claims that it is required to confiscate Petitioners' pictures to avoid criminal prosecution under §311.2 and §§1461-5. What could be a clearer case of compulsion of law!

How did the lower courts and Respondent conclude that state action was not present? The lower courts concluded that the compulsion test did not apply because (1) the statutes were presumptively valid and (2) the compulsion test applied only in race discrimination cases, while Respondent further asserts that because its decision to confiscate pictures was not formulated at the request of law enforcement authorities its act is without the compulsion test. None of these assertions support their conclusion.

8.3.1.1. Subjective Motivation Irrelevant. Once the compulsion of statute exists, the subjec-

tive motivation for Respondent's act becomes irrelevant. In discussing Peterson, supra, the court in Robinson, supra, stated:

> "[A] Greenville ordinance which made it unlawful for restaurants to serve meals to white persons and colored persons in the same room or at the same table or counter. In Peterson the city argued that the manager's refusal to serve Negroes was based on his own personal preference, which did not amount to 'state action' forbidden by the Fourteenth Amendment. But we held that the case must be decided on the basis of what the ordinance required people to do, not on the basis of what the manager wanted to do. We said: 'when a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators'". 378 U.S. at 155-156,84 S.Ct. at 1695. (Emphasis added.)

8.3.1.2. Compulsion Test Not Restricted To Race Discrimination. At App. A-38-39, the District Court stated that:

> "[A] refusal to provide service and

> to deal based on fear of prosecution under state law does not constitute state action... [T]he case here is not a race discrimination case, state action requirements are different in race discrimination cases than they are in other cases."

Respondent has acknowledged that the compulsion doctrine has been adopted by this Court as a basis for finding state action in cases involving racial discrimination. App. A-123.

Neither the lower courts nor Respondent has suggested any reason why an activity done under fear of criminal prosecution should constitute state action if the activity is racial discrimination but not constitute state action if the activity violates free speech.

The test has been specifically applied by the Fourth Circuit in Doe v. Charleston, supra, in a case not involving race discrimination. The plaintiff there sought declaratory and injunctive relief against a hospital for its refusing to allow the plaintiff's physician to perform

an abortion at the defendant's private hospital. The refusal was based upon a fear of criminal prosecution under a state law prohibiting abortion unless necessary to save the life of another. In finding "state action" for purposes of §1983 the Court stated:

> "It seems clear that the anti-abortion hospital policy rests firmly upon what was thought to be the compulsion of state law. Thus the hospital acted 'under color of law'". 529 F.2d at 643-644.

The lower courts here (App. A-50:1-5) and Respondent acknowledge the inconsistency of their position with Doe, but conclude, without any logic or basis, that the Fourth Circuit is wrong.[21/] This clearly acknowledges a conflict in the Circuits. Additionally the conclusion flies in the face of statements by this

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21/ Respondent's Brief to the Ninth Circuit at App. A-126 argued that "Doe is simply wrong" and during oral argument before the Ninth Circuit Respondent's counsel explicitly conceded that the Doe case was indistinguishable from this case.

Court in cases not involving race discrimination. In Flagg, §8.3.1, supra, this Court recited the test in a case not involving race discrimination (but found that the wrong alleged was not compelled). In Lugar, supra this Court in a case not involving race discrimination recited the test.

Admittedly other lower courts (see App. A-124) have by dicta asserted that different standards for state action applied in race discrimination cases, based upon the statement to that effect by Justice Brennan in his concurring and dissenting opinion in Adickes, supra. In N. 14 of Lugar, supra, ___ U.S. at ___, 102 S.Ct. at 2751 this Court stated:

> "Justice Brennan's position [in Adickes] rested, at least in part, on a much less strict standard of what would constitute state action in the area of racial discrimination than that adopted by the majority. In any case, the position he articulated there has never been adopted by the Court."

The Ninth Circuit has ignored this

expression, and the matter should be settled by this Court, and uniformity between the Circuits established.

Similarly in Blum v. Yaretsky, ___ U.S. ____, 102 S.Ct. 2777,2786 (June 25, 1982), this Court in another case not involving race discrimination noted that if the act complained of had been commanded by the state "we would have a different question before us."

8.3.1.3. Presumptive Validity of Statutes Irrelevant. The reliance of the lower courts here upon the presumptive validity of the statutes is misplaced. First, as noted in §8.2 above this application of the statutes is not presumptively valid. But, even were it presumptively valid, the validity has nothing to do with the presence or absence of state action.

Respondent (App. A-129) and the District Court (App. A-49:9) assert that a holding that state action arises by reason

of Respondent's acting to avoid criminal prosecution would place it in a dilemma. Neither Respondent nor the lower courts suggested why that dilemma is any greater for Respondent than it was for those who by reason of state law requiring same were following discriminatory practices in Adickes, Robinson, or Peterson, supra.

The contention that presumptive validity of the statutes and the asserted dilemma were responded to in Lugar, supra. In holding that state action did exist the court responded to similar concerns expressed in the dissenting opinion of Justice Powell and stated as follows:

> "We thus find incomprehensible Justice Powell's statement that we cite no cases in which a private decision to invoke a presumptively valid state legal process has been held to be state action. Post at __, 2761... [A] private party's invocation of a seemingly valid prejudgment remedy statute, coupled with the aid of a state official, satisfies the state action requirement of the Fourteenth Amendment and warrants relief against the private party." N.16, ___ U.S. at ___, 102 S.Ct. at 2752. (Emphasis added.)

"Justice Powell is concerned that private individuals who innocently make use of seemingly valid state laws would be responsible, if the law is subsequently held to be unconstitutional, for the consequences of their actions. In our view, however, this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. A similar concern is at least partially responsible for the availability of a good faith, defense, or qualified immunity, to state officials. We need not reach the question of the availability of such a defense to private individuals at this juncture. What we said in Adickes, 398 U.S. at 174, N. 44, 90 S.Ct. at 1617, when confronted with this question, is just as applicable today:

"'We intimate no views concerning the relief that might be appropriate if a violation is shown..." N. 23, ___ U.S. at ___, 102 S.Ct. at 2757. (Emphasis added.)

8.3.1.4. Conclusion Re Compulsion. The inescapable conclusion must be that Respondent's acts were compelled by the state, that the compulsion test does (or should now once and for all be declared to) apply to First Amendment cases, that there is no basis for limiting the compulsion test to race

discrimination cases, and that such compulsion here constitutes state action, or at a minimum genuine issues of fact were raised by Petitioners below which preclude summary judgment.

8.3.2. State Action Arises From Defendant's Exercise of Censorship Function. One of the recognized bases for finding state action is that the act is one which has "traditionally been the function of the State."22/ Here Respondent acts as a censor in deciding which pictures it will return to the owners. (See nine separate affidavits

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22/ Hall v. Garson, 430 F.2d 430,439 (5th Cir. 1970) [seizure of property to satisfy lien]; Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276 (1946) [functions of town]; Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809 (1953) and Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757 (1944) [primary elections]; North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719 (1975); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972) and Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 460, 89 S.Ct. 1820 (1969) [enforcement of creditor remedies].

filed by Respondent commencing at Ex. 147.)[23/]

Petitioners have contended that censorship has traditionally been a public function. Respondent has never disputed this principle and indeed appears to concur.[24/]

How then does Respondent contend that there is no genuine issue of fact on its censorship constituting state action? First, Respondent attempts to distinguish

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23/ Respondent's assertion that it does not act as a censor (Ex. 87:22) is belied by the true facts. Respondent reviews the pictures and transparencies and decides which ones it will return to the owner thereof based on the content of the film and its evaluation of whether that content is or is not obscene. What else could be involved in censorship?

24/ At App. A-81 we noted that at Ex. 90:19 Respondent seemingly conceded that censorship has "traditionally been the function of the state". In response thereto Respondent discussed this test at App. A-127-130 and at no point disputed that censorship has been "historically a function of the state".

Marsh, supra on the basis that its "position would be analogous to the company town [in Marsh] only if it appeared that Kodak was an officially sanctioned censor..." (Ex. 89:8 and App. A-128). This is a strawman argument because Marsh did not hold (or premise its decision upon the basis) that the company town was officially sanctioned to bar the distribution of religious literature.

Secondly, Respondent claims an unsupported exception to the public function test because Respondent's practice does not totally bar Petitioners' publications. (Ex. 89:16 and App. A-128.) Available alternatives do not save infringement of free speech. (See §8.2.3. above.)

Primarily, however, Respondent claims that the public function test is not applicable in private commercial transactions and supports this claim (App. A-126) by reading too literally (and

too much into) the dictum statement in Flagg, supra that:

> "the field of private commercial transactions would be a particularly inappropriate area into which to expand" "the sovereign-function doctrine". 436 U.S. at 163, 98 S.Ct. 1737.

Respondent interprets statement to mean that the public-function doctrine is inapplicable in all private commercial transactions. We contend that is not how that statement should be interpreted and that it is not possibly what this Court intended. The actual decision in Flagg is as follows:

> "Whatever the particular remedies available under New York law, we do not consider a more detailed description of them necessary to our conclusion that the settlement of disputes between debtors and creditors is not traditionally an exclusive public function." 436 U.S. at 161, 98 S.Ct. at 1736.

If (as Respondent argued) the public function test were never applicable in a private commercial transaction, there would have been no reason for Flagg to

have discussed specifically the settlement of disputes aspect thereof.25/

In Lugar, supra, this Court declared that state action justifying a claim under §1983 was shown in connection with a private commercial transaction case. The court at page 2752-3 relied upon the same public function cases we have cited above and nowhere suggested their inapplicability to private commercial transactions. Other cases in which the test has been applied in a private commercial transaction include North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719 (1975); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972); and Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 460, 89 S.Ct.

25/ Verification that the decision was limited to the dispute resolution aspect of private commercial transactions is found in footnote 12 where the court re-emphasizes that it is dealing with "dispute resolution between creditors and debtors".

1820 (1969).

But whether our analysis or that of Respondent is correct, surely the two literally inconsistent statements from Flagg are worthy of resolution by this Court.

8.3.3. State Action Arises from Trademark and Patent Grants. Petitioners' evidence is that the unique superiority of Respondent's product is a result of its ownership of numerous patents and trademarks granted by the United States and the various States. (Ex. 271-313.)[26/] The third basis for state action is that the State and federal trademark and patent rights granted to Respondent cause sufficient governmental

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26/ Although Respondent argued that alternative processors capable of equal product are available, Respondent neither offered evidence, nor argued, that other processors do in fact produce equal product or that its superiority is not attributable to patents and trademarks previously awarded to it.

involvement to amount to state action under the "nexus test" (§1.1.3, above).

Whether such specific governmental involvement is sufficient to constitute state action has apparently never been decided in a published opinion. (Respondent concurs. App. A-122.) The distilled question is whether the granting of trademark and patent monopolies is more closely aligned with the leasing of public property and therefore state action is present (Burton v. Wilmington, 365 U.S. 715, 81 S.Ct. 856 (1960)) or to the corporate charter-license cases, and therefore state action is absent.

Respondent argues that "the mere grant of a corporate charter is a ministerial government act which does not...make the latter's business...'state action'." (Ex. 84:25, App. A-120.) Granting corporate charters may be ministerial but granting patents is not, and Respondent's attempted analogy to the

corporate charter cases is therefore improper.27/

The charter-license cases cited by Respondent are further inapplicable to trademarks and patents because unlike the former, the latter are the result of a direct grant of powers and rights pursuant

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27/ The Patent Office officers perform more than ministerial acts in reviewing a patent application, in awarding rights and powers pursuant to the Constitution, and in entering into a contract with the patentee regarding the scope and exercise of these constitutional powers. Discretion and judgment is exercised by the officers of the Patent Office at every step in the patent procedure until such time as the bargain is struck with the patentee. See N. 18, App. A-79. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S.Ct. 449 (1974), relied on by Respondent (App.A-121) is distinguishable first, because the Court in Jackson doubted that the state had ever granted or guaranteed the power Company a monopoly (419 U.S. at 352 95 S.Ct. 454), whereas the grant of a patent or trademark is clearly a grant of monopoly and secondly, because this Court there asserted that the governmentally created rights must have a close relationship to the challenged authority, a fact here true. The same distinction was drawn in Taylor v. St. Vincent's Hospital, 523 F.2d 75,77 (9th Cir. 1975) also relied upon by Respondent.

to the U.S. Constitution (Art. I, §8, cl.8), "are issued not for private benefit but for the public good" (Sears Roebuck & Co. v. Stiffel, Co., 376 U.S. 225,230, 84 S.Ct. 784,788 (1964)) and "in rewarding useful invention, the 'rights and welfare of the community must be fairly dealt with.'" (Griffith Rubber Mills v. Hoffar, 313 F.2d 1,3 (9th Cir. 1963)).

8.4. Defendant Did Not Prove Absence Of Justiciable Controversy To Deprive Petitioners' Trial For Declaratory Relief. Respondent's position regarding the fourth count (Ex. 54:20) would force Petitioners to incur the enormous risks and injury which arise when Petitioners submit film to Respondent and then the transparencies are not returned, and to file repeated lawsuits seeking the mere return of these by then stale transparencies. Declaratory relief is the proper means of obtaining a definitive adjudication of rights, thereby avoiding

litigation each time a wrong is committed. See Roe v. Wade, 410 U.S. 113,126, 93 S.Ct. 705,713 (1973). This case presents a classic example of an action "capable of repetition, yet evading review". Roe, supra, 410 U.S. at 125, 93 S.Ct. at 713.

Under §8.2 above, we show that for several separate reasons the state could not engage in this prior restraint of free speech. If application of §§311.2 and 1461-5 requires Respondent to censor Petitioners' pictures, then the same does indirectly what the state cannot do directly and pursuant to Adickes (§8.3.1, supra) such application to a film processor must be declared unconstitutional.

8.4.1. There Is Justiciable Case. The granting the summary judgment motion on the declaratory relief (28 U.S.C. §2201) count was based on the conclusion that "there is no case or controversy" (App. A-41:19) but rather

this was "a collusive action" (App. A-42:5) because "Respondent tells us it has no interest in upholding either set of laws" (App. A-41:25). The authorities cited not only by Respondent, but also by the District Court, as support for reaching this conclusion as a matter of law are inapplicable in that each is premised on a finding of a collusive action or moot case, and this case is neither.28/ There is surely not one shred of evidence or argument by Respondent that it joins, or is in collusion, with Petitioners in their attack on the validity of the application of the laws here in question. To the contrary, Respondent's Answer and Motion for Summary Judgment prove adversity.

28/ Typical is the statement from Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47,48, 91 S.Ct. 1292,1293 (1971) quoted in Respondent's moving papers (Ex. 94:28) that "We are thus confronted with the anomaly that both litigants desire precisely the same result...".

Avoidance of collusion is assured by 28 U.S.C. §2403. The District Court's conclusion that as a matter of law this would be "a collusive action" is in error.29/ If Respondent had no interest

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29/ The District Court relied upon U.S. v. Johnson, 319 U.S. 302, 63 S.Ct. 1075 (1943) and Rutolo v. Rutolo, 572 F.2d 336 (1st Cir. 1978). (Ex. 393:24.) In Johnson the landlord defended a tenant's action on the ground that the Emergency Price Control Act of 1942 was unconstitutional, and the Supreme Court upheld the government's claim of collusion in a motion to reopen the case. 28 U.S.C. §2403 protects against this risk, and there is no evidence of collusion here.

In Ruotolo, supra, a creditor moved to disqualify a retired bankruptcy referee from serving as attorney for the debtor in possession. After denial of the motion the government intervened, following which the creditor withdrew its objection, and the retired referee ceased to represent the debtor. Nonetheless the government appealed the denial of the disqualification motion. The Court of Appeals held that the matter had become moot and that there remained no justiciable issue by reason thereof. Further the Court found that for the government to proceed it had to have an independent basis, and that once the parties had resolved their differences, the government had no such basis, and further that its decision would merely be an advisory opinion. None of the facts in Ruotolo are even tangently similar (cont'd)

in defending the constitutionality of the statutes and if all it wanted to do was be secure against possible prosecution, why did it answer the fourth count?30/

29/ (cont'd) to those here and the decision in no way supports a conclusion that there is not a dispute requiring declaratory relief in this case.

30/ The other authorities cited by Respondent are equally inapplicable. In Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956 (1969), the Supreme Court found that the case or controversy had become moot. In Mendez v. Heller, 530 F.2d. 457 (2d Cir. 1976), the plaintiff sought to challenge a New York two-year residency requirement prior to actually having attempted to file for divorce in the appropriate New York State Courts. The courts are more ready to review threatened deprivations of First Amendment Rights than in other situations. Zwickler v. Koota, 389 U.S. 241,254, 88 S.Ct. 391,399 (1967); Wolff V. Selective Service Local Board No. 16, 372 F.2d 817 (2nd Cir. 1967). In contrast to the situation in Mendez, all possible events have occurred to create an actual dispute between the parties. Plaintiffs have tendered film for processing to defendant and defendant has refused to return the films to Plaintiffs. Thus, the "exigent adversity" mentioned in Mendez exists. Finally, the contention that Granfield v. Catholic University of America, 530 F.2d 1035 (D.C. Cir. 1976) requires the joinder of representatives of the bodies enacting the statutes is in error as demonstrated by other cases cited by Respondent itself.

Here Respondent complains that it engages in censorship and confiscation because the law commands it to do so. An action to recover stale pictures is worthless. Yet the lower courts would place Petitioners in a position where they have no meaningful remedy. Petitioners have no basis for suing the state or federal governments because Petitioners have no information that the governments ever intended the statutes to be applied as Respondent claims they are compelled to apply them. If in addition Respondents are free from attack because they are only following the law[31/], then some remedy must be available to Petitioners to stop

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31/ Respondent's contention (App. A-129) that prosecution of a film lab employee has already been determined as proper based upon Gold v. United States, 378 F.2d 588 (9th Cir. 1967) is in error. The participation by the defendant in Gold was far more then merely returning developed film. Additionally the film in Gold was a completed motion picture, not merely an intermediate step in the publication of a magazine.

the unconstitutional application of these statutes and declaratory relief is that remedy.

8.5. Plaintiffs Did Not Waive Claims. At App. A-116 Respondent argued that it is not obligated to return material depicting matters described in its notice because that notice constituted part of a contract between defendant and plaintiffs. There in N. 6 Respondent concedes that the District Court did not so find. We therefore do not discuss same except to note that at App. A-99-102 we demonstrate that Respondent's position is unsound for a number of reasons including that Petitioners did not agree to Respondent's policy, there is no waiver from Respondent's unilateral notice, Respondent's notice at most is a contract of adhesion and is not enforceable, and First Amendment rights are not waivable.

8.6. Motion Premature. Summary judgment should not be grant-

ed until such time as the party opposing the motion has had an adequate opportunity to conduct discovery.32/ The foregoing rule is particularly true in situations where the facts necessary to oppose the motion are in the possession of the moving party, and here Respondent asserts its subjective intent is a material issue. Respondent's motion herein was made within a few days after counsel for the parties first met to discuss discovery and before any discovery had been taken. Thus, Respondent's motion was premature, and should therefore have been denied.

9. CONCLUSION - RELIEF REQUESTED. By reason of application of certain

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32/ Rule 56(f) of the Federal Rules of Civil Procedure. See also Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 96 S.Ct. 1848 (1976); Poller v. Columbia Broadcasting System, Inc. 368 U.S. 464, 82 S.Ct. 486 7 L.Ed. 2d 458 (1962); Timberlane Lumber Co. v. Bank of America N.T.S.&A. 549 F.2d 597 (9th Cir. 1976); Illinois State Employees Union Council 34 Etc. v. Lewis 473 F.2d 561,565 n.8 (7th Cir. 1972).

statutes Respondent has injected itself into the editorial process of Petitioners' publications, as a censor. Respondent's power to influence Petitioners arises by virtue of trademark and patent grants. An absence of State action cannot be declared as a matter of law. This application of the statutes, improperly places at risk those uninvolved with the publication itself resulting in Respondent's redefining obscenity in a manner never approved by any court, setting itself up as a censor to review, without any court intervention, the content of proposed photographs, and confiscating those photographs it deems obscene. Pursuing a declaration of the unconstitutionality of such application must be permitted. Petitioners cannot be relegated to a valueless common law action for return of stale pictures when it is the very existence of these laws whose application violates Petitioners' freedom of speech and press. While we contend the

state action element has been proved as a matter of law, we need only show that the District Court's decision that as a matter of law there is an absence of state action, is in error.

We pray that this Court grant this Petition so that it may resolve the conflicting decision between the circuits and settle important federal questions not heretofore resolved.

Respectfully submitted,

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(Excerpts under separate cover)